

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No: DA-10-0048

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRUCE LEE HAFNER,

Defendant and Appellant.

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**APPELLANT'S OPENING BRIEF**

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On appeal from the Montana Fourth Judicial District Court, Missoula  
County, the Honorable John W. Larson presiding.

**APPEARANCES:**

Bryan Charles Tipp  
Brett D. Schandelson  
TIPP & BULEY, P.C.  
P.O. Box 3778  
Missoula, MT 59806-3778  
Phone: (406) 549-5186

Attorney for Appellant

Mark Mattioli  
Attorney Generals Office  
P.O. Box 201401  
Helena, MT 59620-1401  
Phone: (406) 444-2026

Suzy Boylan  
Missoula County Attorney's Office  
200 W. Broadway  
Missoula, MT 59802  
Phone: (406) 258-4737

Attorneys for Appellee

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## **STATEMENT OF THE ISSUES**

- I. Does an officer have probable cause to arrest a citizen for driving under the influence, and thereby to request an evidential breath test under Montana's implied consent law, when the officer observed no driving whatsoever, did not conduct any field sobriety tests due to weather conditions, and stated, at the time, that his investigation into driving under the influence was not yet complete at the time of arrest?**
- II. May a District Court deny credit towards an imposed fine for 137 days served in pre-trial detention?**

## **STATEMENT OF THE CASE**

Bruce Hafner, Defendant and Appellant (herein after referred to as Hafner), was arrested after allegedly committing the offense of Driving Under the Influence, a 4<sup>th</sup> or subsequent offense, on January 29, 2008. On August 14, 2008, Hafner filed a Motion to Suppress all evidence seized or observed as a result of that arrest. No evidential hearing was held on the Motion to Suppress. On October 20, 2008, after both parties had briefed the issues, the District Court issued an order denying Hafner's motion. Thereafter, on February 13, 2009, Hafner entered a conditional plea of guilty, reserving his right to appeal the denial of the Motion to Suppress.

Hafner was sentenced on December 10, 2009, at which time the State asserted that he should be given no credit for pre-trial incarceration of 137 days towards the fine because the \$1,000.00 levied was a "mandatory minimum." Hafner objected, seeking credit towards the fine, and the District Court ordered briefing on the issue. The District Court filed a Judgment on December 16, 2009, which did not provide Hafner with any credit for time served towards the fine. Hafner filed a Motion to Amend the Judgment on December 28, 2009. The State failed to file a brief on the matter. On January 22, 2010, the District Court filed an Amended Judgment providing Hafner with credit for time served towards the fine. On January 28, 2010, the State filed a Motion to Reinstate Original Judgment. On

February 1, 2010, the District Court reinstated the original judgment, denying Hafner credit of 137 days towards the \$1,000.00 fine. The District Court did not issue findings of fact or conclusions of law on this issue.

Hafner now appeals from that final judgment.

## **STATEMENT OF THE FACTS**

On January 29, 2008, Officer Jim Agnew (herein after referred to as Agnew) was dispatched to a report of a van that had slide into a ditch and become stuck. (Def. Reply to St.'s Response to Def.'s Mot. to Suppress, Ex. A, p. 1-2). The weather conditions were poor, and the road was snow-covered and icy. (Id.) Agnew made contact with the driver of the van, later identified as Hafner. (Id.) Agnew observed an odor of alcohol coming from the vehicle. (Id.) Upon Hafner exiting the vehicle, Agnew reporting observing the odor of alcohol, and that Hafner's eyes were bloodshot and glassy, and his speech was slurred. (Id.) At this point, instead of having Hafner perform any Standardized Field Sobriety Tests (SFSTs), Agnew merely arrested Hafner and took him into custody. (Id.) Agnew stated he did not have Hafner perform any SFSTs because of "an unsafe location to conduct SFSTs, (icy, and uneven road)." (Id.) Prior to the arrest, Agnew did not request a preliminary breath test (PBT) or preliminary alcohol screening test (PAST), though he did not provide a reason for declining to do so. (Id.) Agnew arrested Hafner to, in his own words, "transport" him to jail to "finish the dui investigation." (Id.) Once at the jail, Agnew requested Hafner provide a breath sample pursuant to Montana's implied consent law. (Id.)

Hafner moved the District Court to suppress any and all evidence seized or observed as a result of his arrest. (Mtn. to Supp., Aug. 14, 2008.) The District

Court issued an order denying Hafner's motion to suppress on October 20, 2008. (Or. Denying Def. Mtn. to Supp.; Or. Setting Trial and Pre-Trial Conference, Oct. 20, 2008.) Hafner entered a conditional guilty plea on February 13, 2009, reserving his right to appeal the denial of his motion to suppress. (Trans. of Appeal, pg. 1-8, Feb. 13, 2009.) Hafner was sentenced on December 10, 2009, and the written judgment was entered on December 16, 2009. (Judgment, pg. 3, Dec. 16, 2009.) The judgment imposed a \$1,000.00 fine and did not provide Hafner with any credit for pre-trial incarceration. (Id.)

Although the District Court acknowledged that Hafner served 137 days in pre-trial incarceration, it denied any credit towards the fine and allowed briefing on the issue. (Id.) After Hafner brief the issue, the District Court issued an Amended Judgment on January 22, 2010, providing Hafner with credit for 137 days of pre-trial incarceration towards the \$1,000.00 fine. (Amend. Judgment, pg 3, Jan. 22, 2009.) The State filed a Motion to Reinstate Original Judgment on January 28, 2010, and Hafner filed an Objection to that motion on January 29, 2010. (Mtn. to Reinstate Orig. Judgment, Jan. 28, 2010.; Obj. to State's Mtn. to Reinstate Orig. Judgment, Jan. 29, 2010.) The District Court issued an order reinstating the original judgment, denying Hafner any credit for pre-trial incarceration, on February 1, 2010. (Order Reinstating Orig. Judgment, Feb. 1, 2010.)

## STANDARDS OF REVIEW

- I. This Court reviews a district court's denial of a motion to suppress to determine whether its findings of fact prove clearly erroneous and whether its interpretation and application of the law remain correct. A court's findings prove clearly erroneous if they are not supported by substantial evidence, the court misapprehended the effect of the evidence, or we are convinced by our review of the record that the district court made a mistake. *State v. Ellington*, 2006 MT 219, ¶ 9, 333 Mont. 411, ¶ 9, 143 P.3d 119, ¶ 9.
- II. This Court reviews the District Court's interpretation of the law to determine whether it is correct regarding sentencing questions involving statutory interpretation. *State v. Wiedrich*, 2005 MT 127, ¶ 10, 327 Mont. 214, ¶ 10, 112 P.3d 1054, ¶ 10.

## SUMMARY OF ARGUMENT

Agnew illegally arrested Hafner because he lacked probable cause to believe Hafner had committed any offense at the time he placed Hafner under arrest. Instead of conducting any SFSTs, or even request a PBT, Agnew opted to just arrest Hafner. Agnew stated that his failure to administer any SFSTs was due “unsafe” conditions and he provided no reason for declining to request a PBT. This Court, however, held in *Bush v. Mont. Dept. of Justice*, that poor weather was not an exception to the probable cause requirement for warrantless arrests. 1998 MT 270, ¶¶ 17, 22, 291 Mont. 359, ¶¶ 17, 22, 968 P.2d 716, ¶¶ 17, 22. Under *Bush*, Agnew lacked probable cause to arrest Hafner, making it an illegal arrest. Further, because Agnew lacked probable cause to believe Hafner was under the influence of alcohol, Agnew’s subsequent request that Hafner provide an evidential breath sample did not comply with Montana’s implied consent law.

Hafner should be given credit of 137 days towards the imposed fine of \$1,000.00, as the statute allows credit to be given and this Court has interpreted the statute authorizing credit in similar situations.

## ARGUMENT

- I. The District Court erred by denying Hafner's Motion to Suppress when the arresting officer lacked probable cause to believe Hafner was under the influence of alcohol, making both the arrest itself, and the subsequent request for a breath test under implied consent, illegal.**

Because Officer Agnew's arrest of the Defendant was not supported by probable cause, as required by Montana Code Annotated § 46-6-311 and by Montana's implied consent law (Montana Code Annotated § 61-8-402), any and all evidence seized or observed as a result of the illegal arrest should have been suppressed from trial as a violation of both the requirements of a warrantless arrest and the implied consent law.

- A. Agnew failed to comply with the requirements of a warrantless arrest because he did not have probable cause to believe Hafner had committed any offense at the time of arrest and there is no "bad weather" exception to the probable cause requirement.**

Agnew arrested Hafner without requesting either SFSTs or a PBT, and because the other objective facts did not independently provide him with probable cause, that arrest was not supported by probable cause. As such, the arrest did not comply with Montana's warrantless arrest statute, Montana Code Annotated § 46-6-311. The arrest was, therefore, an illegal seizure under Montana Constitution, Article II, §§ 10-11. The remedy for an illegal arrest under these circumstances is suppression of any and all evidence seized or observed as a result of the illegal arrest, and the District Court erred when it denied Hafner's Motion to Suppress.

For an arrest to be valid under Montana law, it must either be supported by a warrant, or probable cause and exigent circumstances. Mont. Code Ann. §§ 46-6-210, 311(1). Probable cause exists if, at the time of the arrest, there were “sufficient facts and circumstances within the officer’s personal knowledge to warrant a reasonable person’s belief that the suspect had committed an offense.” *In re the License of Cybulski*, 2008 MT 128, ¶ 26, 343 Mont. 56, ¶ 26, 183 P.3d 39, ¶ 26. A warrantless arrest requires more than “mere suspicion” that criminal activity has taken place; it requires a reasonable belief that a crime has been committed. *Bush v. Mont. Dept. of Justice*, 1998 MT 270, ¶ 15, 291 Mont. 359, ¶ 15, 968 P.2d 716, ¶ 15.

If an arrest is not supported by probable cause, it is an invalid, illegal arrest. Mont. Code Ann. § 46-6-311(1). If the arrest is invalid, all evidence seized as a result of the arrest must be suppressed. *State v. Ellington*, 2006 MT 219, ¶ 19, 333 Mont. 411, ¶ 19, 143 P.3d 119, ¶ 19 (holding that “an unlawful arrest renders evidence seized as a product of that arrest inadmissible”); *State v. May*, 2004 MT 45, ¶ 20, 320 Mont. 116, ¶ 20, 86 P.3d 42, ¶ 20 (holding that “all evidence obtained as a result of the [illegal] arrest must be suppressed”). Suppression of any and all evidence seized or observed as a result of that arrest is mandated when an individual is arrested when the facts do not support a finding of probable cause.

While field sobriety tests are not a prerequisite, *per se*, to a finding of probable cause, the absence of such observations can support a finding of a lack of probable cause. *Cybulski*, ¶ 29 (citing *City of Missoula v. Forrest*, 236 Mont. 129, 133, 769 P.2d 699, 701 (1989)); *Bush*, ¶¶ 16-22.

The Court, in *Bush*, held that the arresting officer lacked probable cause to believe the driver had committed a crime, despite the driver's admission of drinking alcohol, the officer's observations of erratic tire tracks leading to the petitioner's car off the road, and the smell of alcohol on the driver. *Bush*, ¶¶ 3-6, 16-17, 22. The State in that case asserted that, due to weather conditions, it would have been unsafe or unreasonable to have the driver perform any SFSTs. *Id.*, ¶ 17. The Court, however, rejected the State's argument. *Id.*, ¶¶ 17, 22.

Specifically, the Court noted that "since [the arresting officer] declined to perform any field sobriety tests" the record is devoid of indicia of impairment sufficient for a finding of probable cause. *Id.*, ¶ 19. Despite the admission of drinking, apparent erratic driving, and the smell of alcohol, the Court held that the arresting officer "did not have probable cause" to arrest, in part, because there were no SFSTs conducted. *Id.*, ¶¶ 19-22. In declining to adopt the State's position, the Court effectively held that there is no "bad weather" exception to the probable cause requirement for warrantless arrests. Despite the weather conditions, under

*Bush*, arresting officers **must** have probable cause to arrest, regardless of the safety or ability to conduct SFSTs. *Id.*, ¶¶ 17, 22.

When the nature of the alleged criminal conduct is so extreme so as to provide an independent basis for probable cause, the absence of field sobriety tests will not defeat a finding of probable cause. *Cybulski*, ¶¶ 26-30. In *Cybulski*, the Court determined that the officer had probable cause to arrest the driver without performing any field sobriety tests because of the “flagrant nature of [the driver’s] traffic violation, her absolute obliviousness to her surrounding environment, and her delayed response to the officers’ attempts to pull her over.” *Id.*, ¶ 28. The driver had been traveling westbound in the eastbound lane of I-94 for at least half an hour, and when officers attempted to initiate a traffic stop by using emergency signals, sirens and spotlights, the driver continued driving, the wrong way, for more than six miles. *Id.*, ¶ 27. The Court held that officers had “probable cause to immediately arrest [the driver]” because probable cause existed “under these egregious circumstances.” *Id.*, ¶ 28. Specifically, the Court noted that, because of these facts, the officer had “ample probable cause to arrest [the driver] for drunk driving without conducting any sobriety testing.” *Id.*, ¶ 29.

Similarly, in *City of Missoula v. Forrest*, because of the nature of alleged criminal offense, the arresting officer had probable cause to arrest despite the lack of SFSTs. *Forrest*, 236 Mont. at 132-33, 769 P.2d at 701. The defendant in

*Forrest* was responsible for an accident that, as the Court put it, was caused by “reckless and dangerous conduct” which resulted in “serious injuries.” *Id.* The reckless, dangerous accident, when combined with the officer’s observations of bloodshot eyes, a flushed complexion, and the smell of alcohol, provided the officer with sufficient evidence for probable cause without conducting any SFSTs. *Id.*

Although weather may limit which SFSTs an officer is able to conduct, he or she has other tools at their disposal to assist in determining the level of impairment, if any, in an individual without merely arresting that individual and taking them into custody. Officers may use other tools, short of a complete set of SFSTs to establish probable cause.

For example, officers may conduct the horizontal gaze nystagmus (HGN) test regardless of weather conditions, and use the score on that test to support a finding of probable cause. Further, there are other, non-standardized, field sobriety tests capable of being done when weather prevents an officer from safely conducting SFSTs. The finger to nose test, the alphabet test, fingertip dexterity test, and the hand clap test are all examples of tests that can be performed safely, regardless of weather conditions. An officer’s observation during any of these tests can be used to support a finding of probable cause.

Finally, the officer may request a PAST (PBT) under Montana Code Annotated § 61-8-409 regardless of weather conditions. Further, the standard to request a PAST is the lower standard of particularized suspicion, which is the same standard an officer must have to request SFSTs in the first place. Mont. Code Ann. § 61-8-409 (an officer may request a PAST upon particularized suspicion); *Hulse v. Dept. of Just.*, 1998 MT 108, ¶ 38, 289 Mont. 1, ¶ 38, 961 P.2d 75, ¶ 38 (holding that SFSTs are searches and any request for SFSTs must be supported by a particularized suspicion that an individual is driving under the influence). The result, or refusal, of a PAST can provide the officer with sufficient probable cause to arrest an individual for driving under the influence, and can be requested regardless of the weather conditions.

In this case, however, Agnew declined to do any tests, whatsoever, opting to merely arrest Hafner and continue the DUI investigation at the detention center. While Agnew certainly may have had particularized suspicion, the objective facts available at the time Agnew arrested Hafner do not support a finding of probable cause. As such, the arrest was illegal and therefore any and all evidence seized or observed as a result of that arrest should have been suppressed from trial.

Like in *Bush*, Agnew declined to conduct any SFSTs due to “an unsafe location to conduct SFSTs, (icy, and uneven road).” (Def. Reply to St.’s Response to Def.’s Mot. to Suppress, Ex. A, p. 1-2.) The Court in *Bush*, however, rejected

the State's argument that weather relieved the arresting officer of the probable cause requirement because it would have been unsafe to conduct SFSTs. *Bush*, ¶¶ 17, 22. The Court held the arresting officer lacked probable cause because he failed to perform any sobriety tests, even those that could have been safely conducted, and the other objective facts did not support a finding of probable cause. *Id.*, ¶¶ 17-22.

A similar result should be reached here because Agnew failed to conduct any field sobriety tests whatsoever, and the other objective facts do not otherwise support a finding of probable cause. At best, Agnew had a reasonable suspicion that Hafner was committing a crime; warrantless arrests, however, require “more than mere suspicion.” *Id.* ¶ 15. Even if the objective facts here support a finding of particularized suspicion, which they very well may, Agnew declined to act on that suspicion by conducting sobriety tests or requesting a PBT. (*Id.*) Agnew opted, instead, to merely arrest Hafner instead of actually investigating whether Hafner was guilty of DUI. That investigation did not take place until **after** Agnew arrested Hafner. (*Id.*)

Agnew did not request any SFSTs or breath tests until **after** he arrested Hafner and **after** Hafner was in custody in the Missoula County Detention Center. (*Id.*) Agnew admitted as much, at the time, by writing that he “transported” Hafner to the jail to “finish the dui investigation.” (*Id.*) Agnew, at the time he arrested

Hafner, had not yet made a determination whether Hafner had committed a crime, because his investigation was not yet complete. It was not complete because Agnew did no investigation prior to arresting Hafner.

When contrasted with other cases where individuals were arrested both without a warrant and without field sobriety tests, it becomes clear that the facts present in this case do not support a finding of probable cause sufficient to justify a warrantless arrest.

For example, in *Cybulski*, there were numerous 911 calls and officer observations of extremely erratic driving, indicative of impairment, before the driver was arrested, or even pulled over. *Cybulski*, ¶¶ 27-29. The driver in *Cybulski* drove for more than half an hour in the wrong lane of traffic, and failed to respond to emergency lights for more than 6 miles. *Id.* The driving was so bad that, on appeal, the Court termed the traffic violation “flagrant,” and the circumstances as a whole, as “egregious.” *Id.*

Similarly in *Forrest*, the driver had caused a “reckless and dangerous” accident resulting in “serious injuries.” 236 Mont. at 132-33, 769 P.2d at 701. Given the seriousness of the accident and the apparent reckless behavior that caused it, there was probable cause to arrest the driver without conducting any SFSTs. *Id.*

Conversely here, however, the record is void of such facts that would independently support a finding of probable cause in the absence of field sobriety tests. Specifically, there is no driving at issue, whatsoever. Agnew was dispatched to a report of a van that had become stuck on the side of the road. (*Id.*) The road, however, was snow-covered and icy. (*Id.*) Unlike *Cybulski* and *Forrest*, there is no evidence of any erratic, or even illegal, driving in this case.

Although contemporaneous with an explanation, the facts in *Bush* are more indicative of impairment than the facts here, because the officer in *Bush* observed erratic tire tracks and followed them to the driver's vehicle. *Bush*, ¶¶ 3-6. Yet, the Court in *Bush*, despite the officer's observations, held there was not probable cause to arrest the driver. *Id.*, ¶ 22.

A similar result should be reached here. Agnew observed no driving indicative of impairment, and in fact, observed no driving whatsoever. (*Id.*) Agnew observed facts that provided him with, at best, a suspicion that Hafner was driving under the influence, but Agnew totally declined to act on that suspicion by conducting any field sobriety tests or requesting a PBT. (*Id.*) Instead, Agnew decided to arrest Hafner immediately, and conduct the DUI investigation at the jail. (*Id.*) Although Agnew asserts that he declined to conduct SFSTs and merely arrest Hafner because of bad weather, (*Id.*), there is no "bad weather" exception to the probable cause requirement for warrantless arrests. *Id.*, ¶¶ 19-22. Agnew did not

have probable cause to arrest Hafner at the time he placed him into custody to “finish the dui investigation,” making the arrest illegal. Because the remedy for an illegal arrest is suppression of any and all evidence seized or observed as a result of that illegal arrest, *Ellington*, ¶ 19, the District Court erred when it denied Hafner’s Motion to Suppress.

**B. Agnew failed to comply with the implied consent law because Agnew lacked probable cause to believe Hafner was under the influence of alcohol at the time he requested a breath test.**

Because Agnew failed to comply with Montana’s implied consent law, evidence of the refusal, as well as any evidence gained after the refusal, should have been suppressed from trial.

Before an officer may request a breath or blood test pursuant to Montana’s implied consent law, the person must lawfully be under arrest. Mont. Code Ann. § 61-8-402 (2007); *Bush*, ¶ 12. The arrest must comply with the “constitutional and statutory requirements for a warrantless arrest, including the existence of probable cause” before an officer may ask a suspect to submit to a blood or breath test. *Id.* If an arresting officer lacked probable cause at the time of the arrest, the suspect is not validly subject to Montana Code Annotated § 61-8-402 and the penalties of that section are not applicable, *Bush*, ¶¶ 14, 22, including the inference that may arise from a refusal of a breath test.

As shown above, Agnew lacked probable cause to arrest Hafner, making the arrest itself illegal, mandating suppression under *Ellington*. Additionally, because Agnew did not have probable cause to believe Hafner was driving under the influence, the subsequent request for a breath test did not conform with Montana's Implied Consent law. Under *Bush*, therefore, Hafner was not properly subject to Montana's Implied Consent law and the fact of refusal should have been suppressed from trial. *Bush*, ¶¶ 14, 22.

**II. The District Court erred by failing to provide Hafner with credit for pre-trial detention towards the imposed fine.**

Because Montana Code Annotated § 46-18-403(2) clearly allows credit to be given, and the Court in *State v. Wiedrich* vacated a \$1,000.00 fine in extremely similar circumstances, the District Court erred when it refused to provide Hafner with credit for 137 days of pre-trial incarceration towards the \$1,000.00 fine imposed. 2005 MT 127, ¶ 19, 327 Mont. 214, ¶ 19, 112 P.3d 1054, ¶ 19.

Montana Code Annotated § 46-18-403(2) states in full:

A person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of the offense may be allowed a credit for each day of incarceration prior to conviction, except that the amount allowed or credited may not exceed the amount of the fine. The daily rate of credit for incarceration must be established annually by the board of county commissioners by resolution. The daily rate must be equal to the actual cost incurred by the detention facility for which the rate is established

Mont. Code Ann. § 46-18-403(2).

Although the statute is not written as mandatory, using the word “may” instead of “must,” the holding in *Wiedrich* seems to suggest that the Court views it as a mandatory provision. *Wiedrich*, ¶ 19. In that case, the defendant was denied credit for 227 days of pre-trial incarceration towards the \$1,000.00 fine imposed. *Id.* The Court stated that Montana Code Annotated § 46-18-403(2) requires a district court to provide the defendant with credit towards the fine. *Id.* Specifically, the Court stated that “the credit the District Court was **required** to grant [the defendant] far exceeded the \$ 1,000.00 fine.” *Id.* (emphasis added). The Court then vacated the fine. *Id.*

The situation here is exactly the same as in *Wiedrich*, and the same result should be reached. The District Court imposed a \$1,000.00 fine but refused to allow credit of 137 days. Under the Court’s interpretation of Montana Code Annotated § 46-18-403(2), as a mandatory requirement, Hafner should have been given credit for 137 days of pre-trial incarceration towards the \$1,000.00 fine imposed. The District Court, therefore, erred when it denied Hafner credit for 137 days of pre-trial incarceration towards the fine imposed.

## CONCLUSION

*“Warrantless arrest[s] require more than mere suspicion.”*

-Hon. Justice William Hunt, Sr (writing for the Court in *Bush*, ¶ 15)

If nothing else, one thing is absolutely clear from a reading of the record: Agnew decided to arrest first and investigate later. Although he asserts, and the State may argue, that it would have been unreasonable to conduct SFSTs on the roadside, there are a number of tests and tools Agnew had at his disposal to assist in a probable cause determination – none of which were utilized. Agnew failed to conduct the HGN test, with no explanation. Agnew failed to conduct any of the non-standard field sobriety tests, with no explanation. Finally, Agnew failed to request a PBT, the result or refusal of which could have provided Agnew with the probable cause he needed to arrest Hafner, again, with no explanation. Any of these tests could have been conducted, regardless of the weather conditions.

However, Agnew failed to investigate at all. That is, until **after** he arrested Hafner and took him into custody. At that point, Agnew had no problem requesting SFSTs and a breath test. Before that point, however, Agnew completely failed to utilize the tests and tools at his disposal and opted to merely arrest Hafner without the requisite probable cause.

Unlike in *Cybulski* and *Forrest*, the facts here do not independently support a finding of probable cause, because there was no “egregious” driving, as in


*Cybulski*, or “reckless” and “dangerous” driving, as in *Forrest*. While Agnew may have had a particularized suspicion of wrongdoing, even absent SFSTs, Agnew completely failed to act within his authority pursuant to that suspicion, by requesting SFSTs or a PBT, and opted to instead merely arrest Hafner and investigate later.

Because Agnew failed to investigate prior to arresting Hafner, and the objective facts do not independently support a finding of probable cause, like in *Cybulski* and *Forrest*, Agnew’s warrantless arrest of Hafner was not supported by probable cause. As such, it was an illegal arrest. The District Court, therefore, erred when it denied Hafner’s Motion to Suppress.

Further, the District Court erred when it denied Hafner with credit for 137 days of pre-trial incarceration towards the \$1,000.00 imposed fine. Under *Wiedrich*, the District Court was “required” to provide credit for pre-trial incarceration towards the fine. *Wiedrich*, ¶ 19. Therefore, the District Court erred when it failed to provide credit for 137 days of pre-trial incarceration towards the fine.

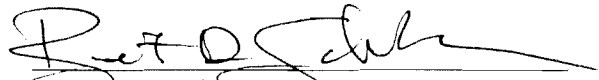
DATED this 13<sup>th</sup> day of May, 2010.

TIPP & BULEY, P.C.

  
Brett D. Schandelson  
Attorney for Appellant

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text of fourteen (14) points; is double spaced; and the word count calculated by Word 2003 for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding the cover page, table of contents, table of authorities, certificate of compliance, certificate of mailing and appendix.



Brett D. Schandelson  
Attorney for Appellant

## CERTIFICATE OF MAILING

I hereby certify that I caused a true copy of the foregoing document to be mailed to the following person(s), at the address(es) shown, by placing a copy of the same in the United States Mail at Missoula, Montana, in an envelope with first class postage prepaid, this 13<sup>th</sup> day of May, 2010.

Mark Mattioli  
Attorney Generals Office  
P.O. Box 201401  
Helena, MT 59620-1401

Suzy Boylan  
Missoula County Attorney's Office  
200 W. Broadway  
Missoula, MT 59802



TIPP & BULEY, P.C.